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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

COMMISSIONERS

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MIKE GLEASON, Chairman  
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AZ CORP COMMISSION  
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IN THE MATTER OF THE APPLICATION OF  
ARIZONA WATER COMPANY TO EXTEND ITS  
CERTIFICATE OF CONVENIENCE AND  
NECESSITY IN CASA GRANDE, PINAL  
COUNTY, ARIZONA.

DOCKET NO. W-01445A-03-0559

**PROCEDURAL ORDER RULING ON  
MOTION TO STRIKE TESTIMONY**

**BY THE COMMISSION:**

On July 30, 2007, the Arizona Corporation Commission ("Commission") issued Decision No. 69722. Decision No. 69722 extended the deadline for compliance with the conditions of Decision No. 66893 (April 6, 2004) to July 30, 2007, and ordered that for purposes of compliance, Arizona Water Company ("AWC") has fulfilled the conditions set forth in Decision No. 66893 for an extension to its Certificate of Convenience and Necessity ("CC&N"). Decision No. 69722 found that there may not be a current need or necessity for water service in the portions of the extension area that are owned by Cornman Tweedy 560, LLC ("Cornman"); that Cornman does not wish to have its property included in AWC's CC&N at this time; and that these issues bear further examination and may have some relevance to the best interests of the area ultimately to be served. Decision No. 69722 therefore remanded this case to the Hearing Division for further proceedings regarding whether AWC should continue at this time to hold a CC&N for the area depicted in Exhibit B to that Decision (the Cornman extension area).

Decision No. 69722 stated that as the CC&N holder, AWC is entitled to appropriate notice and an opportunity to be heard, and that the proceeding on remand will be for the purpose of considering whether the Cornman property should be deleted from the CC&N extension granted to AWC by Decision No. 66893. Decision No. 69722 further stated that the proceeding on remand should be broad in scope so that the Commission may develop a record to consider the overall public

1 interest underlying service to the Cornman property that is included in the extension area granted by  
2 Decision No. 66893. In Decision No. 69722, this Commission stated that by identifying these issues  
3 and requiring further proceedings, the Commission is not prejudging this matter in any way; instead,  
4 the Commission merely desires an opportunity to consider the broader public interests implicated in  
5 Decision No. 69722.

6 On August 17, 2007, Cornman filed an Application for Rehearing and Reconsideration of  
7 Decision No. 69722. The Commission took no action thereon.

8 A Procedural Conference convened on October 16, 2007, for the purpose of allowing the  
9 parties to Decision No. 69722 an opportunity to discuss a suitable hearing date and associated  
10 procedural schedule, and other procedural matters related to the remand proceeding. AWC,  
11 Cornman, and the Commission's Utilities Division Staff ("Staff") appeared through counsel. At that  
12 time, AWC and Cornman disagreed regarding the need for the presentation of additional facts in the  
13 remand proceeding. They also disagreed regarding the burden of proof.

14 A Procedural Order dated November 8, 2007, concluded that because the Commission  
15 previously determined that it is in the public interest for AWC to hold the CC&N for the Cornman  
16 extension area and that AWC is a fit and proper entity to provide water utility service to the Cornman  
17 extension area, the determination to reopen the record did not place the burden on AWC to  
18 demonstrate that it should continue to hold a CC&N for the Cornman extension area. The November  
19 8, 2007, Procedural Order found further that it is appropriate "to allow Cornman ample opportunity to  
20 present additional relevant evidence that Cornman believes may be necessary to inform the  
21 Commission's decision in this remand proceeding regarding whether AWC should continue to hold a  
22 CC&N at this time for the Cornman extension area." The Procedural Order set the matter for hearing  
23 to commence February 14, 2008, and established a schedule for pre-filed written testimony.

24 On January 4, 2008, Cornman filed the Direct Testimony of Jim Poulos, Dr. Fred Goldman  
25 and Paul Hendricks. The same date, AWC filed the Direct Testimony and Exhibits of William  
26 Garfield.

27 On February 4, 2008, a Procedural Order was issued granting a request by AWC and  
28 Cornman to extend the date for the filing of rebuttal testimony from February 1, 2008, to February 5,

1 2008. The Procedural Order also granted a request by AWC to continue the commencement of the  
2 remand hearing from February 14, 2008, to February 15, 2008.

3 On January 18, 2008, Staff filed the Rebuttal Testimony of Steven Olea.

4 On February 5, 2008, Cornman filed the Rebuttal Testimony of Mr. Poulos and Dr. Goldman.

5 Also on February 5, 2008, AWC filed the Rebuttal Testimony of Mr. Garfield and Frederick  
6 Schneider.

7 On February 7, 2008, AWC filed "Arizona Water Company's Motion to Strike Cornman  
8 Tweedy's Irrelevant Testimony and Exhibits" ("Motion to Strike").

9 On February 8, 2008, Cornman filed "Cornman Tweedy's Motion for Modification of  
10 Procedural Schedule (Expedited Relief Requested)." Following a telephonic procedural conference,  
11 a Procedural Order dated February 12, 2008, granted an extension of time to file pre-hearing briefs,  
12 established deadlines to respond to the Motion to Strike, continued the hearing date indefinitely  
13 pending further order, and set oral argument on the Motion to Strike for February 22, 2008.

14 On February 15, 2008, AWC filed its Pre-Hearing Brief addressing the legal standard under  
15 Arizona law for granting the relief being sought in the remand proceeding; Cornman filed a Response  
16 to AWC's Motion to Strike and Pre-Hearing Brief on Legal Issues; and Staff filed its Pre-Hearing  
17 Brief and Response to Arizona Water Company's Motion to Strike ("Staff Response").

18 On February 19, 2008, AWC filed a Reply in Support of Motion to Strike.

19 The Procedural Conference for oral argument on the Motion to Strike convened as scheduled  
20 on February 22, 2008. AWC, Cornman, and Staff appeared through counsel.

21 **AWC's Position**

22 In its Motion to Strike, AWC seeks to strike as irrelevant to the issues in the remand  
23 proceeding the following Direct Testimony of James Poulos:

- 24 • Page 1, line 14 through page 5, line 7 (discussing his duties as general manager of  
25 Robson-owned public utilities and describes Robson's development business and  
26 master-planned communities);
- 27 • Page 9, line 10 through page 10, line 7 (identifies allegedly relevant public policy  
28 issues including whether a single water provider should serve an entire development,

1 and whether the Commission should opt for an integrated water and wastewater  
2 provider and discusses Cornman's other witnesses, Dr. Goldman and Mr. Hendricks);

- 3 • Page 15, line 7 through page 19, line 16 (discussing integration of water and  
4 wastewater service and the organization of Picacho in particular); and
- 5 • Exhibit 1 (a list of Robson-owned utilities)

6 AWC also seeks to strike the entirety of Mr. Poulos' Rebuttal Testimony (regarding the scope of the  
7 proceeding), the entirety of Dr. Goldman's Direct and Rebuttal Testimony, including his Exhibits A-  
8 C, and the entirety of Mr. Hendrick's Direct Testimony.

9 AWC notes that both Decision No. 69722 and the Commission's November 8, 2007  
10 Procedural Order agree that no issue exists in this remand proceeding as to AWC's fitness to serve  
11 the Cornman property. In addition, AWC asserts there is no issue concerning the fitness of some  
12 other water utility to serve the property as there is no competing water utility with a pending  
13 application. AWC argues the sole issue in the remand proceeding is whether the Cornman portion of  
14 AWC's CC&N may be deleted consistent with Arizona law, which AWC states only requires an  
15 inquiry into whether AWC has either failed or refused to provide service to the subject property.

16 AWC argues that much of Mr. Poulos' testimony is irrelevant and improperly proffered on  
17 behalf of Robson, Robson Utilities and Picacho Water Company, none of whom are parties to this  
18 case. AWC argues Mr. Poulos' discussions of his duties as general manager of Robson-owned  
19 utilities and the organization of Picacho have no relevance to this proceeding, and his discussion of  
20 Robson's development business and master-planned communities, is not appropriate. AWC asserts  
21 that of Mr. Poulos' identified "public policy issues," the fourth (whether a single water provider  
22 should serve an entire development) and fifth (whether the Commission should opt for an integrated  
23 water and wastewater provider) are irrelevant as it is already settled that AWS is a fit and proper  
24 provider and there is no competing utility. In addition, AWS argues Mr. Poulos' testimony  
25 concerning Cornman's other witnesses, Dr. Goldman and Mr. Hendricks, is irrelevant because those  
26 witnesses testify about allegedly irrelevant topics and is being provided on behalf of entities that lack  
27 standing. AWC asserts further that the entirety of Mr. Poulos' Rebuttal Testimony and exhibits  
28 which consist of legal arguments should be stricken on the basis they have no relation with the legal

1 grounds for deleting a portion of AWC's CC&N.

2 Dr. Goldman is an engineer of water and wastewater systems. Dr. Goldman's testimony is  
3 offered to address the "public policy and cost issues that arise from an engineering and design  
4 standpoint by splitting the water service to EJR Ranch between two different water providers."  
5 Goldman's Direct at 3. AWC argues that as Cornman contends that its property does not need water  
6 service at all, and Picacho has no pending application to provide service, the testimony concerning  
7 how efficient Picacho would be and how it would be more reliable and efficient than AWS is not  
8 relevant. AWC argues that Dr. Goldman's arguments for and on behalf of Picacho serving the  
9 relevant area are an impermissible collateral attack on final decisions by the Commission and are  
10 prohibited by A.R.S. § 40-252.

11 Mr. Hendricks' testimony concerns the alleged benefits of integrated water and wastewater  
12 systems. AWC argues that like Dr. Goldman's testimony, Mr. Hendrick's Direct Testimony attempts  
13 to raise issues that are not relevant to the remand proceeding and are barred by A.R.S. § 40-252 as an  
14 impermissible collateral attack on final Commission decisions. AWS notes that no integrated utilities  
15 are parties to this case or have pending applications to serve the subject property, and the  
16 Commission has already decided that AWC is a fit and proper entity to provide public water utility  
17 service.

18 In its February 15, 2008, Prehearing Brief, AWC argues that the legal standard for whether  
19 the Cornman property should be deleted from AWC's CC&N is governed by the standards set forth  
20 in *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 671 P.2d 404 (1983). AWC  
21 asserts that pursuant to *James P. Paul*, the only relevant consideration in this remand proceeding is  
22 whether AWC has failed to provide adequate service at reasonable rates. The Arizona Supreme  
23 Court found in *James P. Paul*:

24  
25 Once granted, the [CC&N] confers upon its holder an exclusive right to  
26 provide the relevant service for so long as the grantee can provide  
27 adequate service at a reasonable rate. If a [CC&N] within our system of  
28 regulated monopoly means anything, it means that its holder has the right  
to an opportunity to adequately provide the service it was certificated to  
provide. Only upon a showing that a certificate holder, presented with a  
demand for service which is reasonable in the light of projected need has  
failed to supply such service at a reasonable cost to customers, can the

Commission alter its certificate. Only then would it be in the public interest to do so.

*James P. Paul*, 137 Ariz. at 429, 671 P.2d at 407.

AWC asserts Cornman's efforts to distinguish *James P. Paul* lack merit. AWC agrees with Staff's assessment of the appropriate scope of the proceeding, but not with Staff's conclusions the Motion to Strike is not appropriate. AWC argues that even though the Commission directed the remand proceeding to be "broad in scope," it must still comply with Arizona law. AWC Reply at 2-3.

### **Cornman's Position**

Cornman asserts that the Commission made a clear directive in Decision No. 69722 that there should be further evidentiary proceedings to consider whether the Cornman property should be deleted from the CC&N extension granted to AWC in Decision No. 66893; and further that the remand proceeding should be "broad in scope so that the Commission may develop a record to consider the overall public interest underlying service to the Cornman property. . . ." Decision No. 69722 at 4. Cornman argues that the Commission can and should consider and weigh all relevant evidence which bears upon the overall public interest underlying utility service to the subject property. Cornman asserts the testimony of Mr. Poulos, Dr. Goldman and Mr. Hendricks goes directly to the issues the Commissioners want to hear in this remand proceeding and should not be stricken. Cornman argues that the Commissioners have rejected any notion that the *James P. Paul* opinion limits the scope of the remand proceeding.

In light of the Commission having already determined in Decision No. 69722 that AWC is fit and proper and AWC has made clear that it is willing to serve the Cornman property, Cornman argues that AWC's argument that the scope of the proceeding must be limited to whether AWC remains fit and willing to serve the Cornman property is "nonsensical." Cornman argues the Commission has directed a broad remand proceeding to specifically address: (1) whether there is "a current need or necessity for water service in the portions of the extension area that are owned by Cornman" and (2) the reasons why "Cornman does not wish to have its property included in Arizona water's CC&N at this time." Decision No. 69722 at 4, lines 1-5. Cornman argues all of its offered testimony goes to the complete lack of a need and necessity for utility service at the Cornman property

1 and the various reasons why Cornman does not want AWC to provide water service to the property.  
2 As such, Cornman argues it is exactly within the scope of the remand proceeding as set forth in  
3 Decision No. 69722 and relevant to the Commission's consideration of the public interest issues  
4 raised in this case.

5 In addition, Cornman argues that the *James P. Paul* case is not applicable to the current  
6 proceeding because the underlying facts are distinguishable. Cornman argues the more applicable  
7 case is *Arizona Corp. Comm'n v. Arizona Water Co.*, 111 Ariz. 74, 523 P.2d 505 (1974), which the  
8 Arizona Supreme Court cited and distinguished in the *James P. Paul* decision. The earlier *Arizona*  
9 *Water* case involved the initial grant of a CC&N. The *James P. Paul* court stated that for an initial  
10 CC&N, the public interest is determined by comparing the capabilities and qualifications of  
11 competitors vying for the exclusive right to provide service, as well as "[t]he amounts of time and  
12 money competitors must spend (at the consumers' ultimate expense). . . ." *James P. Paul*, 137 Ariz.  
13 at 430, 671 P.2d at 408. Cornman argues the circumstances in the proceeding before the  
14 Commission now are more akin to those in *Arizona Water* than *James P. Paul* because the remand  
15 proceeding is simply a continuation of Docket No. W-01445A-03-0559, wherein the Commission is  
16 considering an initial issuance of a CC&N for the area. Thus, Cornman asserts the legal standard set  
17 forth in *James P. Paul* does not apply here, and the Commission may consider the broader public  
18 interest relevant in the grant of an initial CC&N as discussed in the *Arizona Water* case. Cornman  
19 also asserts there is no need and necessity or request for service on the Cornman property at this time.  
20 Cornman states it is not asking the Commission to delete the CC&N and give it to a competitor,  
21 rather it is requesting that the property be deleted from the AWC CC&N.

22 Cornman argues that even if the *James P. Paul* standard applies in this case, the proffered  
23 testimony is relevant to the issue of whether AWC can provide adequate service at reasonable rates  
24 because it cannot provide integrated water and wastewater service and because the additional  
25 facilities that it must construct to serve the Cornman property would increase costs to ratepayers.

26 Furthermore, Cornman argues that granting a motion to strike in an administrative proceeding  
27 before the Commission is not a usual occurrence because the Administrative Law Judge is able to  
28 reserve judgment on the relevancy of the testimony until she can evaluate the legal arguments of the

1 parties. According to Cornman, to allow the testimony creates a full record that can then support the  
2 Commission's ultimate conclusions, and avoids having the matter remanded for further evidence.  
3 Cornman argues that given that the testimony has already been filed and the matter is ready for  
4 hearing, conducting the evidentiary hearing preserves all options for the Administrative Law Judge  
5 and the Commissioners without taxing judicial economy.

6 **Staff's Position**

7 Staff believes that because Decision No. 69722 confirmed that AWC has completely fulfilled  
8 the requirements for holding the CC&N granted in Decision No. 66893, the scope of the remand  
9 hearing should be consistent with a deletion proceeding, that is, whether AWC is presently willing  
10 and able to provide service at reasonable rates. That being said, Staff also believes that granting the  
11 Motion to Strike would be inappropriate.

12 Staff believes the nature of the proceeding will be narrower in scope than advocated by  
13 Cornman. Staff opines that to the extent Cornman's additional evidence pertains to a current need for  
14 service and property owner preference, it would only be relevant to an initial grant of a CC&N.  
15 According to Staff, *James P. Paul* found that it is insufficient to show that the public need and  
16 necessity has not arisen yet as a basis for deleting a CC&N. *James P. Paul*, 137 Ariz. at 430, fn. 3,  
17 671 P.2d at 408. Staff asserts that demonstrating that the public interest is against permitting AWC to  
18 even begin providing service would require some showing that AWC is somehow incompetent to  
19 hold any CC&N, which "focuses the inquiry on whether AWC is fit and proper to hold a CC&N."  
20 Staff Response at 4. Staff opines further that to the extent the reasonableness of the rates for the  
21 service provided is an issue, testimony relating to whether AWC's retention of a CC&N will have the  
22 effect of increasing the costs borne by the ratepayers would be within the scope of a deletion  
23 proceeding.

24 Notwithstanding Staff's interpretation of *James P. Paul*, Staff believes that it would be  
25 inappropriate to grant the Motion to Strike. Staff states that generally the Commission offers all  
26 parties the opportunity to present evidence as they believe relevant and helpful to their positions. In  
27 this case, the Commission specifically desired that the remand proceeding be "broad in scope so that  
28 the Commission may develop a record to consider the overall public interest underlying service to the

1 Cornman property . . . .” Decision No. 69722 at 20. Staff believes that Cornman should have “an  
2 opportunity to present the case they believe expresses their position on the merits of the proceeding.”  
3 Staff Response at 4.

4 **Resolution**

5 In Decision No. 69722, the Commission found that AWC is a fit and proper entity to provide  
6 water utility service to the extension area, including the Cornman property; that for purposes of  
7 compliance, AWC has met the conditions set forth in Decision No. 66893; and that the matter should  
8 be reopened pursuant to A.R.S. § 40-252 for further proceedings regarding whether AWC should  
9 continue to hold a CC&N for the Cornman property. Decision No. 69722 provided that “Arizona  
10 Water Company is hereby on notice that the Commission’s subsequent proceedings on remand will  
11 be for the purpose of considering whether the Cornman property should be deleted from the CC&N  
12 extension granted to Arizona Water Company by Decision No. 66893.” Decision No. 69722 at 21  
13 (emphasis added). The November 8, 2007, Procedural Order reiterated this understanding, in essence  
14 likening the proceeding to a petition to delete a portion of AWC’s CCN for the Cornman extension  
15 area, and stating that Cornman bears the burden of proof in this remand proceeding. The remand  
16 proceeding will determine whether the Cornman property should be deleted from AWC’s CC&N. It  
17 is not a proceeding to judge the relative merits of two alternative providers as might be considered in  
18 an application for an initial grant of a CC&N.

19 At this juncture of the proceeding we do not believe it is in the interest of justice or in the  
20 spirit of Decision No. 69722 to pre-judge the relevancy of the Cornman pre-filed testimony. We  
21 have not yet had the opportunity for cross examination or post-hearing briefs. We believe that  
22 Cornman should have the opportunity to develop its factual and legal positions, and we deny the  
23 Motion to Strike at this time. As this is an administrative proceeding, the Administrative Law Judge  
24 and Commissioners are able to reserve judgment on the relevance of the evidence until the record is  
25 more fully developed, and give all evidence the weight they find appropriate.

26 IT IS THEREFORE ORDERED that Arizona Water Company’s Motion to Strike is denied.

27 IT IS FURTHER ORDERED that a Procedural Conference shall be held on **September 17,**  
28 **2008, commencing at 2:00 p.m.,** or as soon thereafter as practicable, at the Commission’s offices,

1 1200 W. Washington, Room 100, Phoenix, Arizona, for the purpose of scheduling a date for the  
2 continuation of the remand hearing ordered by Decision No. 69722.

3 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules  
4 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission  
5 *pro hac vice*.

6 IT IS FURTHER ORDERED that withdrawal of representation must be made in compliance  
7 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the  
8 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances  
9 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is  
10 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the  
11 Administrative Law Judge or the Commission.

12 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized  
13 Communications) continues to apply to this proceeding and shall remain in effect until the  
14 Commission's Decision in this matter is final and non-appealable.

15 IT IS FURTHER ORDERED that the time periods specified herein shall not be extended  
16 pursuant to Rule 6(a) or (e) of the Rules of Civil Procedure.

17 IT IS FURTHER ORDERED that the Administrative Law Judge may rescind, alter, amend,  
18 or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at  
19 hearing.

20 Dated this 5<sup>th</sup> day of September, 2008.

21  
22   
23 TEENA WOLFE  
24 ADMINISTRATIVE LAW JUDGE

25 The foregoing was mailed/delivered  
26 This 5<sup>th</sup> day of September, 2008 to:

27 Robert W. Geake  
28 ARIZONA WATER COMPANY  
Post Office Box 29006  
Phoenix, AZ 85038

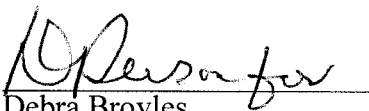
Steven A. Hirsch  
BRYAN CAVE, LLP  
Two North Central Avenue, Suite 2200  
Phoenix, AZ 85004-4406

1 Jeffrey W. Crockett  
2 SNELL & WILMER  
3 One Arizona Center  
Phoenix, AZ 85004

4 Janice Alward, Chief Counsel  
5 Legal Division  
6 ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

7 Ernest G. Johnson, Director  
8 Utilities Division  
9 ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

10 ARIZONA REPORTING SERVICE INC.  
11 2200 N. Central Ave., Suite 502  
Phoenix, AZ 85004

12  
13 By:   
14 Debra Broyles  
Secretary to Teena Wolfe